No. 01-1276

IN THE

SUPREME COURT OF THE UNITED STATES

MORETON ROLLESTON, JR.,

Petitioner,

v.

ST. PAUL FIRE & MARINE INSURANCE CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

1. Moreton Rolleston, Jr.
2. St. Paul Fire and Marine Insurance

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STATEMENT OF FACTS

Although the petitioner has filed this Application for Certiorari "*Pro Se*," he neglects to acknowledge that he is an attorney who is a member of the bar of the United States Supreme Court, with previous experience before this Court. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), in which he represented the Heart of Atlanta Motel, Inc., of which he was sole owner.

The petitioner was found liable to St. Paul Fire & Marine Insurance Co. (hereinafter referred to as St. Paul) for fraud on December 1, 1999. This judgment is attached hereto as Appendix "A". Thus the petitioner's assertion that at the time of entry of the order appealed that "St. Paul was not a judgment creditor, as required by GRUPO" was and is entirely false.

The action underlying this appeal was filed to attack apparently fraudulent conveyances of property from the Petitioner Moreton Rolleston, Jr., of certain real estate to the Moreton Rolleston, Jr. Living Trust, with Moreton Rolleston, Jr. as sole grantor, sole trustee, and sole beneficiary. The petitioner asserts as error the grant of summary judgment by the Court below on the grounds that summary judgment in all cases violates the Constitutional right to trial by jury. However, as a review of the opinion of the trial court (which is attached hereto as Exhibit "B") shows, the trial court did not grant any such motion. Rather, the trial court's ruling was "The trial Court finds that Plaintiff's claim under O.C.G.A. 18-2-22(3) is moot." See page seven of Appendix "B".

The Petitioner's statement of facts cites language from a previous decision. However, he neglects to cite the case, include any copy of what he is referring to in his brief, or otherwise edify either the Court or his adversary as to what case he is referring to. Nor does Mr. Rolleston indicate whether St. Paul was even a party to whatever case he is referring to. Nor does he indicate why this previous other case

has anything to do with this one.

As it is the petitioner's responsibility to set out the facts of the case in a coherent manner, the respondent shows that Mr. Rolleston has made no effort at all to characterize the nature of the dispute at bar. However, to aid the Court, a brief description of the case is stated below.

Exhibit "A" to this brief is a judgment for fraud St. Paul obtained against Mr. Rolleston in the Federal District Court for the Northern District of Georgia in case number 1:99-CV-287-GET, which was affirmed by The United States Court of Appeals for the Eleventh Circuit in case number 99-15136. However, Mr. Rolleston had previously transferred all of his assets of any kind into "The Moreton Rolleston, Jr. Living Trust" in a fraudulent transfer intended to thwart collection by known claims including St. Paul's fraud claim. The state court action subject to this application for Certiorari is St. Paul's fraudulent conveyance claim. The trial Court judge held that the fraudulent conveyance claim was moot, because the fraudulent conveyance itself had previously been set aside.

PROCEDURAL HISTORY

This action is a part of an epic legal battle that commenced on May 31, 1985, when Mr. Rolleston, acting as attorney for Rebecca Wight Cherry Sims, attended a real estate closing of certain property (which was appurtenant to accreted lands he was litigating as against another claimant) on St. Simons Island, Georgia without his client, the purported seller. Mr. Rolleston refused to close the transaction, largely because he realized that doing so exposed him to legal malpractice claims associated with the contract he had negotiated for his client, since conveyance of the property would also convey the riparian claim over the accreted land. Instead of informing his client of the problem, he sought to evade it without her knowledge by telling her that the purchasers were in breach.

This lead to a lawsuit against his client by the purchasers (Coast House, Ltd. and Sandease, Ltd.), in which he acted as attorney for Ms. Sims. During the course of this litigation, Mr. Rolleston was disqualified as counsel by the trial judge due to his obvious conflict of interest. Mr. Rolleston appealed that disqualification unsuccessfully (*Rolleston v. Coast House, Ltd.*, 257 Ga. 403; 359 S.E.2d 904 (1987). Mr. Rolleston continued to represent his client in defiance of his disqualification through the conclusion of a specific performance trial, which ended in favor of the purchasers and contained a specific finding of fact that Mr. Rolleston had acted in bad faith. At the same time, Mr. Rolleston sued the trial judge for disqualifying him, claiming a constitutional right to represent the client of his choosing. This suit (see *Rolleston v. Eldridge*, 848 F.2d 163 (11th Cir. 1988)) was also unsuccessful.

Ultimately, Coast House/Sandease obtained a judgment against Ms. Sims for abusive litigation in the amount of $3,800,000 (including an award of $800,000 in attorneys fees) from a jury trial. This led Ms. Sims (now diseased) to bring claim against Mr. Rolleston on numerous grounds including fraud, malpractice, contribution and breach of fiduciary duty. Ultimately, she obtained a judgment for $5,200,000 plus prejudgment and post-judgment interest, which was affirmed on appeal. *Rolleston v. Cherry*, 226 Ga. App. 750; 487 S.E.2d 354 (1997).

In the meantime, St. Paul, as his Errors & Omissions insurer, filed a reservation of rights, claiming that the underlying policy had been obtained by fraud, since Mr. Rolleston knew of the fraud he was committing against his client and others at the time he applied for his insurance policy.

Immediately after the Cherry judgment against him was entered, Mr. Rolleston filed deeds transferring all of his assets, real and personal, to the aforementioned Moreton Rolleston, Jr. Living Trust. This led to a fraudulent

conveyance claim by the Sims Estate, which ultimately had the transfers set aside. *Rolleston v. Cherry*, 233 Ga. App. 295; 504 S.E.2d 504 (1998). See also *Rolleston v. Cherry*, 237 Ga. App. 733; 521 S.E.2d 1 (1999). In addition, the Sims Estate received a jury verdict for fraud damages in an amount in excess of $4,000,000, including more than $3,000,000 in punitive damages. *Rolleston v. Cherry*, 253 Ga. App. 182; 558 S.E.2d 417 (2001).

In the meantime, St. Paul had received a judgment for fraud against Mr. Rolleston in the amount of $1,125,000 plus interest (see exhibit "A" hereto), which represented the amount of a supersedeas bond that was posted by St. Paul under its reservation of rights while Mr. Rolleston appealed the first Sims judgment. When Mr. Rolleston's appeal was unsuccessful, the bond was paid over to the Sims Estate, forcing St. Paul's fraud suit.

The matter before this Court is St. Paul's suit to attack the fraudulent conveyances to the Moreton Rolleston, Jr. Living Trust, which was held to be moot on account of prior judgments ruling that the transfers were fraudulent per se.

ARGUMENT AND CITATION OF AUTHORITY

II. THE PETITIONER'S FIRST QUESTION, WHICH ASSERTS THAT SUMMARY JUDGMENT IS UNCONSTITUTIONAL IN ALL CASES, IS NOT BEFORE THIS COURT.

The Petitioner's first argument, consisting of two one sentence paragraphs lacking any specific citations of law, asserts that all summary judgment procedures in all Courts within the territorial confines of the United States are unconstitutional because "the U.S. Constitution provides for trial by jury."

This novel position could be attacked based upon any of the multitude of decisions by this and other Courts dealing with Summary Judgments. However, this is entirely

unnecessary because no summary judgment was granted in this case. This entire issue is moot. BECAUSE ST. PAUL HAD A JUDGMENT AGAINST THE PETITIONER (SEE EXHIBIT "A") AT THE TIME THAT THE JUDGMENT SUBJECT TO THIS CERTIORARI WAS ENTERED, THE PETITIONER'S SECOND QUESTION IS BASED UPON A FALSE PREMISE.

St. Paul obtained a judgment against the petitioner on December 1, 1999, which is attached hereto as Exhibit "A". The Petitioner in his argument as to his second question asserts that *Grupo Mexicano deDesarrollo, S.A. et al. V. Alliance Bond Fund, Inc.*, et al., 143 F.3d 688 requires a judgment before a creditor has any claim on the opposing party. Since St. Paul did in fact have a money judgment against Mr. Rolleston, this entire argument has no possible merit.

III. BECAUSE ST. PAUL HAD A JUDGMENT AGAINST THE PETITIONER (SEE EXHIBIT "A") AT THE TIME THAT THE JUDGMENT SUBJECT TO THIS CERTIORARI WAS ENTERED, THE PETITIONER'S THIRD QUESTION IS BASED UPON A FALSE PREMISE.

The Petitioner's third argument is a rehash of his second, with the exception that indicates that *Grupo Mexicano deDesarrollo, S.A. et al. V. Alliance Bond Fund, Inc.*, et al., 143 F.3d 688 cites the Commerce Clause of the United States Constitution, Article 1, Section 8, as the basis for its conclusion that a creditor must have a judgment before he can attach the assets of the debtor. As is shown by Exhibit "A" attached hereto, St. Paul indeed has such a judgment against the petitioner, and had that judgment at the time that the order being appealed was entered.

CONCLUSION

As the Petitioner rightly points out, brevity is precious. The lower Court did not err. All of the issues raised by the

Petitioner are based upon provably false premises. St. Paul was a judgment creditor at the time the order at issue was entered, and no summary judgment was entered by the Court below. The petitioner's entire argument is specious.

In his application for Certiorari, Mr. Rolleston has attempted to perpetrate a fraud on this Court just as he has perpetrated frauds on Rebecca Wight Cherry Sims and later upon her Estate through fraudulent conveyances, as well as St. Paul. No constitutional or other issues have been raised in the Petition on review of the true facts, and Certiorari should therefore be denied.

Respectfully Submitted,

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Attorney for the Respondent

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ST. PAUL FIRE & MARINE INSURANE

COMPANY

Plaintiff, CIVIL ACTION FILE

vs. NO.1:99-cv-287-GET

MORETON ROLLESTON, JR.

Defendant.

JUDGMENT

This action having come before the court, Honorable G. Ernest Tidwell, United States District Judge, for consideration of plaintiff's motion for summary judgment, and the court having granted said motion and having directed that judgment be entered, it is

Ordered and Adjudged that the plaintiff recover from defendant the amount of $1,125,000.00, plus interest from January 1, 1999 at the current legal rate of 5.471%, plus the costs of this action.

Dated at Atlanta, Georgia this 1 st day of December, 1999.

LUTHER D. THOMAS
CLERK OF COURT
BY: s/ Pamela Wright
Deputy Clerk

"Exhibit A"

Prepared, Filed and Entered
In the Clerk's Office
December 1, 1999
Luther D. Thomas
Clerk of Court
By: /s/ Pamela Wright
Deputy Clerk

United States Court of Appeals
For the Eleventh Circuit

No. 99-15136
Non-Argument Calendar

District Court Docket No. 99-00287-CV

ST. PAUL FIRE AND MARINE INSURANCE CO.,

versus

Plaintiff-Counter-defendant-Appellee,

MORETON ROLLESTON, JR.,

Defendant-Counter-plaintiff-Appellant

Appeal from the United States District Court
For the Northern District of Georgia

Before BIRCH, COX and WILSON, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby AFFIRMED.

IT IS FURTHER ORDERED THAT the defendant-counter-plaintiff-appellant pay to the plaintiff-counter-

defendant-appellee, the costs on appeal to be taxed in accordance with Fed.R.App.P.39.

Entered: July 24, 2000
For the Court: Thomas K. Kahn, Clerk
By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: August 25, 2000

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUL 24 2000
THOMAS K. KAHN
CLERK

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ST. PAUL FIRE & MARINE INSURANCE COMPANY,	)	
Plaintiff,	)	**CIVIL ACTION**
v.	)	**FILE NO., 1999CV05671**
MORETON ROLLESTON, JR., individually; MORETON ROLLESTON, JR., Living Trust and MORETON ROLLESTON, Jr., in his capacity as Trustee and/or Beneficiary, Moreton Rolleston, Jr. Living Trust,	)	
Defendants.	)	

ORDER

DEFENDANTS MORETON ROLLESTON, JR., individual, MORETON ROLLESTON, JR, Living Trust, and MORETON ROLLESTON, JR., in his capacity as Trustee and/or Beneficiary, Moreton Rolleston, Jr. Living Trust ('Defendants") have brought before this Court their **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.** PLAINTIFF ST. PAUL FIRE & MARINE INSURANCE COMPANY ('Plaintiff") has filed its **PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY**

"Exhibit B"

JUDGMENT AND CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION FOR INTERLOCUTORY INJUNCTION. The Court heard argument on the Motions on August 14, 2000. Having read and considered all relevant facts and law, the Court hereby finds as follows:

Facts

The procedural history and factual background of this action involves several other related lawsuits.

Common Facts:

1. Plaintiff issued a policy to the individual Defendant for September, 1985 to September, 1986, which included a Dishonest Acts Exclusion ("DAE") clause, relieving Plaintiff of coverage for claims resulting from "dishonest, fraudulent or criminal" acts or omissions.
2. In March and April of 1995, the individual Defendant transferred property and financial accounts to a Trust set up by him, wherein he was the beneficiary and/or trustee.

Malpractice Action:

3. In 1995, the estate of Rebecca Wight Cherry Sims ('Estate") won a judgment against the individual Defendant in this Court, for claims of professional negligence, breach of fiduciary duty and fraud, and for indemnity in another action. Plaintiff provided the defense and supersedeas bond, both subject to the DAE clause. The judgment was affirmed in December, 1997.

Coverage Action:

4. On February 23, 1998, the United States District Court ("USDC") ruled, in a declaratory judgment action filed by the individual Defendant, that Defendant's conduct as to the Estate was not covered by the policy and Defendant was liable for repayment of the bond. The Court found that Defendant was liable to Plaintiff for "$1,125,000.00, plus interest from January 1, 1999 at the current legal rate of 5.471%, plus the costs of this action." (See Judgment and Order attached to Plaintiff's Notice of Filing, filed April 12, 2000.)

Fraudulent Conveyance Action:

5. In April, 1995, the Estate sued Defendants in this Court to set aside the March and April, 1995 conveyances as fraudulent, for damages, for imposition of a constructive trust and for injunctive relief. In July, 1995, the Court granted an interlocutory injunction, which was affirmed on appeal. In July, 1998, this Court granted the estate partial summary judgment, wherein it set aside the conveyances as fraudulent. (See Exhibit B of Plaintiff's Response to Amendment of Defendants' Brief in Support of Motion for Summary Judgment, filed November 3, 2000.)

Instant Action:

6. Plaintiff filed its Complaint against Defendants on March 1, 1999, seeking to have the 1995 transfers of property set aside as fraudulent pursuant to O.C.G.A. §§ 18-2-22 (1)-(3), for a constructive trust on all proceeds from the transfers, for a permanent

injunction as to any future transfers, and for damages. Defendants answered on April 10, 1999.

7. Defendants filed their instant Motion for summary Judgment on March 10, 2000, followed by supplemental briefs.
8. Plaintiff filed its brief in opposition to Defendants' Motion and its Cross Motion for Partial Summary Judgment and Motion for Interlocutory Junction on April 12, 2000, and filed responses to each of Defendants' supplemental briefs.
9. On August 14, 2000, the Court heard oral argument from the parties on the cross motion.

Conclusions

1. Defendants' Motion for Summary Judgment:

Defendants first cite Grupo Mexicano de Desarrolo, S.A.v.Alliance Bond Fund, Inc., 527 U.S.___144 L.Ed.2d 319, 119 S.Ct. ___(1999) to argue that Plaintiff has no standing to seek an injunction, since it has no judgment against them and they were not indebted to Plaintiff at the time of the transfers. Second, Defendants argue that O.C.G.A. § 18-2-22(3) interferes with interstate commerce by creating an impermissible restraint on trade, as it prevents an individual from selling property while a lawsuit is pending. Finally, Defendants contend that they did not consent to the reservation of rights clause in the policy; thus, Plaintiff's payment on the bond was voluntary.

In response, Plaintiff asserts that it has a valid judgment against Defendants. See ¶4 in Facts section above. Plaintiff further argues that the issue of Defendants' liability for repayment of the bond is res judicata, as the issue was decided by the USDC in the

Coverage Action; thus, Defendants should not be allowed to relitigate that issue before this Court.

Plaintiff further contends that it stands in the place of the Estate as a surety on the bond; thus, Plaintiff is entitled to injunctive relief. As support, Plaintiff cites O.C.G.A. § 10-7-56, which states that "[a] surety who has paid the debt of his principal shall be subrogated, both at law and in equity, to all the rights of the creditor and, in a controversy with other creditors, shall rank in dignity the same as the creditor whose claim he paid."

Plaintiff next argues that the fraudulent conveyance statute does not violate interstate commerce. Plaintiff cites O.C.G.A. § 18-2-22(3), which states as follows: "The following acts by debtors shall be fraudulent in law against creditors and others and as to them shall be null and void…every voluntary deed or conveyance, not for a valuable consideration, made by a debtor who is insolvent at the time of the conveyance." Plaintiff contends that the statute protects creditor's rights from a debtor's attempts to give away assets to avoid paying a debt. Also, Plaintiff contends that since § 18-2-22(3) deals with conveyances for no consideration, it does not burden the sale of assets for fair consideration.

The Court hereby denies Defendants' Motion for Summary Judgment. Plaintiff has standing to seek an injunction in this action both because it has a valid judgment against the individual Defendant and because Plaintiff stands as a surety in the place of the Estate.[1] See¶4 of Facts section above and O.C.G.A. § 10-7-56. Also, Defendants have shown no valid support for their contention that O.C.G.A. § 18-2-22(3) is

1. The Court finds that the Grupo case is factually distinguishable and is not relevant to this action.

unconstitutional. Finally, the Court will not entertain factual issues regarding Defendants' liability as to the bond, as this issue is res judicata based on the USDC judgment.

2. Plaintiff's Cross Motion for Partial Summary Judgment

Plaintiff argues it is entitled to summary judgment on its claim to set aside Defendants' conveyances to the Trust as fraudulent pursuant to O.C.G.A. § 18-2-22(3). As support, Plaintiff argues that all factual determinations material to this claim were determined in the Fraudulent Conveyance action and the Coverage action. See ¶¶ 4-5 of Facts section above. Thus, Plaintiff contends these issues are res judicata in this action. Plaintiff also asserts that the individual Defendant has admitted in pleadings that he has insufficient assets to pay Plaintiff's judgment. Finally, Plaintiff contends that O.C.G.A. § 107-7-56 allows it, as a surety on the bond, to stand in the place of the Estate and entitles it to the same protection which the Estate receives.

Defendants counter that at the time of the transfers, they were not indebted to Plaintiff and had no reasonable expectation of indebtedness. Defendants further argue that this Court's summary judgment order in the Fraudulent Conveyance action by its terms applies only to the Estate. Defendants also dispute that the individual Defendant was insolvent at the time of the transfers and dispute the applicability of the reservation of rights clause in Plaintiff's policy.

The Court hereby finds that when it set aside the conveyances as fraudulent in the prior action, the property was placed back into the individual Defendant's name. Thus, no conveyances remains to be set aside.

Accordingly, the Court finds that Plaintiff's claim under O.C.G.A. § 18-2-22(3) is moot.

3. Plaintiff's Motion for Interlocutory Injunction:

Plaintiff contends that it is entitled to an interlocutory injunction as it has shown that it would prevail at a final trial, or alternatively is entitled to summary judgment as to the setting aside of the fraudulent conveyances. In addition, Plaintiff argues that the individual Defendant has shown a willingness in the past to avoid creditors by transferring assets to the Trust, which, if allowed to occur during this action, would frustrate Plaintiff's rights. Finally, Plaintiff asserts that an injunction would maintain the status quo until this matter is resolved.

Defendants argue that at the time of the transfers in 1995, Defendants were not indebted to Plaintiff and anticipated no indebtedness; thus, Plaintiff, as a creditor without a lien, may not enjoin Defendants from disposing of property nor get an injunction or other extraordinary relief. Defendants cite as support O.C.G.A. § 9-5-6, which states "Creditors without liens may not, as a general rule, enjoin their debtors from disposing of property nor obtain injunctions or other extraordinary relief in equity."

The Court concludes that O.C.G.A. § 9-5-6 deals with creditors who have no lien or have not reduced their demands to a judgment. In the instant case, Plaintiff has a valid judgment against the individual Defendant in the Coverage Action. Moreover, the injunction acts merely to preserve the status quo of the parties pending the outcome of the instant case. Accordingly, Plaintiff's motion for an interlocutory injunction is granted. However, the Court hereby limits said injunction to the extent that Defendants are not prohibited from lawfully selling their property for fair market value, so long as

said sale complies with all prior orders of this Court regarding this matter, and all proceeds are held subject to the creditors named above in this order.

NOW THEREFORE, Defendants' MOTION FOR SUMMARY JUDGMENT is hereby **DENIED**, Plaintiff's CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT is moot, and Plaintiff's MOTION FOR INTERLOCUTORY-INJUNCTION is hereby **GRANTED** in accordance with the above limitation.

AND IT IS SO ORDERED.
This the 22 nd day of February, 2001.

By: s/ Isaac Jenrette
ISAAC JENRETTE
JUDGE, SUPERIOR COURT
OF FULTON COUNTY
ATLANTA JUDICIAL CIRCUIT

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